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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO.

ERWINE LAVERNE, ESTELLE LAVERNE and LAVERNE INC.,

Appellants,

v.

INCORPORATED VILLAGE OF LAUREL HOLLOW and HOWARD CORNING, JR., individually, and as Mayor of the Incorporated Village of Laurel Hollow; and HUTCHINSON DUBOSQUE, ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, individually, and as Trustees of the Incorporated Village of Laurel Hollow; and MARTIN DWYER, individually and as Chairman of the Planning Board of the Incorporated Village of Laurel Hollow; and HUGH JOHNSON, individually, and as Building Inspector of the Incorporated Village of Laurel Hollow; and EDWARD J. MEEHAN, individually, and as Police Sergeant of the Incorporated Village of Laurel Hollow,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS, STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals, State of New York, entered July 7, 1966, affirming the order of the Appellate Division, Second Department, on February 28, 1966, modifying and affirming a judgment entered by the Nassau County Supreme Court on February 24, 1965, dismissing Appellants' com-

plaints. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The following opinions and orders below are relevant to this appeal, and those that are unreported are attached hereto in Appendix A:

Nassau County Supreme Court Order Denying Motion to Vacate Notice of Examination Before Trial (May 7, 1964; unreported) (A-1, *infra*);

Nassau County Supreme Court Opinion on Motion to Strike the Complaints (September 1, 1964; unreported) (A-1, *infra*);

Appellate Division Opinion (22 A.D. 2d 826, 255 N.Y.S. 2d 146 (1964));

Nassau County Supreme Court Opinion Granting Motion to Dismiss Complaints (February 15, 1965; unreported) (A-6, *infra*);

Appellate Division Opinion (February 28, 1966; unreported) (A-10, *infra*);

Appellate Division Order (February 28, 1966; unreported) (A-12, *infra*);

Opinion of Court of Appeals, State of New York (July 7, 1966; unreported) (A-13, *infra*).

JURISDICTION

This case was begun as two civil actions in the Supreme Court of Nassau County, New York, where Appellants sought damages arising out of unlawful searches of their premises, and unlawful seizure of their property, including trade secrets. Appellants' complaints were dismissed by order of the New York Court of Appeals,

entered July 7, 1966, upon appeal from an order of the Appellate Division, Second Department, affirming the Nassau County Supreme Court. This judgment was pursuant to New York Civil Practice Law and Rules § 3126, providing for dismissal for failure to comply with a pretrial discovery order. Discovery had been resisted by timely and explicit assertion of the privilege against self-incrimination, under the Fifth and Fourteenth Amendments to the Constitution of the United States. Notice of Appeal to this Court was filed in the Nassau County Supreme Court on October 5, 1966. Subsequently, on November 22, 1966, pursuant to Rule 13(1) of this Court, Appellants applied for an extension of time, until January 19, 1967, for docketing the case. This application was granted by Hon. Stanley H. Fuld, Chief Judge of the New York Court of Appeals, on December 2, 1966. Notice of the extension of time was provided to the other parties in accordance with Rule 34(4) of this Court. The jurisdiction of this Court to review this case on appeal is conferred by 28 U.S.C. § 1257(2). Decisions of this Court sustaining this jurisdiction are *Dahnke-Walker Milling Company v. Bondurant*, 257 U.S. 282 (1921), and *Malloy v. Hogan*, 378 U.S. 1 (1963).

STATUTE INVOLVED

New York Civil Practice Law and Rules § 3126.

> § 3126. Penalties for refusal to comply with order or to disclose.
>
> If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

QUESTION PRESENTED

Whether a State statute violates due process and the privilege against self-incrimination, by providing for dismissal of a civil action on the ground that the plaintiff, at pre-trial deposition, has refused to answer questions that might tend to incriminate him, particularly where incrimination is manifest, where the questions are not related to any proffer of an affirmative defense, where other procedures and other sources for obtaining the information are available, and where less harsh sanctions would preclude any unfairness to the defendant.

STATEMENT OF THE CASE

In this case, Appellants are seeking through orderly judicial processes to redress grievances against a number of public officials who were responsible for conducting unlawful searches of their premises and unlawful seizures of their property. These unlawful searches and seizures included the taking of color photographs of artistic processes that were professional trade secrets, and which were subsequently made public. As stated by Chief Judge Desmond in an earlier case involving the

same circumstances, the unlawful searches were made with "no showing of probable cause or reasonable ground for a search to detect possible zoning law violations. Indeed, there was no cause or ground at all."[1] In their complaints below Appellants alleged common law and statutory trespass, breach of implied covenant of quiet enjoyment running between a community and its inhabitants, and conspiracy to steal and theft of trade secrets. Damages claimed total $2,150,000.

Appellants' complaints have been dismissed without any trial on the merits. The ground for dismissal was that Appellant Erwine Laverne willfully failed to purge himself of disobedience to court orders by asserting his constitutional privilege against self-incrimination at pre-trial depositions. This federal question first arose in this case when Appellees served Appellant Laverne with notice for depositions, or Examination Before Trial (EBT). Appellant then sought to vacate that notice in a motion that asserted the privilege. His concern with incriminating himself arose from a series of previous actions instituted against him by one or more of the Appellees. These actions included:

(1) In 1953 the Village of Laurel Hollow sought an injunction against Appellants, alleging that they were using their premises (the former Tiffany Estate Mansion) for commercial purposes in violation of the Building Zone Ordinance. The Supreme Court found that Appellants were professional persons and entitled to exercise professional rights, but admonished them that they were not entitled to run a factory. The Appellate Division affirmed without opinion, modifying the order to add specific prohibited acts such as having on the premises paint, thinners, and large quantities of wallpaper.[2]

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[1] *People v. Laverne*, 14 N.Y. 2d 304, 251 N.Y.S. 2d 452, 456 (1964) (concurring opinion).

[2] *Incorporated Village of Laurel Hollow v. Laverne*, 283 A.D. 795, 128 N.Y.S. 2d 326, *aff'd*, 307 N.Y. 784, 121 N.E. 2d 618 (1954).

(2) In 1954 Appellants were prosecuted and found guilty of violating the Building Code Ordinance.[3]

(3) In 1962 a Building Inspector three times entered and searched the premises, and the Village moved for an order of contempt of the injunction. Appellants were fined $250.00. This was reversed on appeal on the ground that the searches had been conducted unlawfully.[4]

(4) In 1963 two more inspections resulted in an additional fine. This conviction was also reversed because the searches had been conducted unlawfully.[5]

(5) In 1963 three criminal prosecutions were instituted against Appellant Laverne for violating the Building Zone Ordinance. He was found guilty and was given a six months suspended sentence. This conviction was also reversed because of unlawful searches.[6]

(6) In 1963 the Village brought suit in three causes of action against Appellants for $787,900 under a provision for assessment of zoning violation penalties at $100.00 a day. Two of the actions were dismissed because of unlawful searches, but the third was not dismissed because "plaintiffs may produce lawful evidence on the trial to establish the violations."[7]

The Nassau County Supreme Court held that the privilege against self-incrimination must be claimed by the witness at the time a particular question to which it applies is asked, and directed Appellant to appear to be

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[3] See *Incorporated Village of Laurel Hollow v. Laverne Inc.*, 43 Misc. 2d 248, 250 N.Y.S. 2d 951, 953 (1964).

[4] *Incorporated Village of Laurel Hollow v. Laverne Originals Inc.*, 17 N.Y. 2d 900, 271 N.Y.S. 2d 996, 218 N.E. 2d 900 (1966).

[5] *Ibid.*

[6] *People v. Laverne*, 14 N.Y. 2d 304, 251 N.Y.S. 2d 452, 200 N.E. 2d 441 (1964)

[7] *Incorporated Village of Laurel Hollow v. Laverne, Inc.*, 24 A.D. 2d 615, 262 N.Y.S. 2d 622, 625 (1965).

examined on May 29, 1964. (A-1, *infra*). Appellant appeared and gave his name but, acting under advice of counsel, declined to answer some sixteen specific questions, beginning with his address. The privilege against self-incrimination was asserted as the ground in each instance, and Appellant's counsel explained specifically that "He might possibly be violating the Building Ordinance of the Incorporated Village of Laurel Hollow." Eight of the questions related to the status of the corporation (*e.g.*, when and where it was incorporated and whether Appellant Laverne was an officer). Four of the questions related to whether Appellant had brought with him corporate books and records. When counsel for Appellees asked counsel for Appellants what position he would take if a subpoena were issued to the corporation demanding production of corporate books and records, counsel for Appellants replied, "I don't know what I would do at that particular point . . . I suggest if you want to follow that procedure that you follow it." No such subpoena was issued. Appellants' counsel also stated that he intended "to direct the witness not to answer any questions in this Examination Before Trial on the ground that it might possibly tend to incriminate him. . . ." (Transcript, EBT, May 29, 1964).

Appellees made no offer of proof at the EBT, but subsequently, in support of a Motion to Dismiss the Complaints, averred that they sought to determine "whether any such trade or other secrets were or are carried as assets of the corporation," and "whether the corporation has suffered any loss of profits as a result of the alleged deprivation of such secrets." (Ulman Affidavit in Support of Motion to Dismiss, par. 18). Appellees specified no other basis for discovery, made no offer of proof, and asserted no affirmative defenses.

The Nassau County Supreme Court denied the Motion to strike the complaints, but on condition that Appellant purge himself by answering the questions already asked. (A-4, *infra*) Although the court expressed an aware-

ness of the "history of extended and extensive litigation" between the parties, it was unable to find "any basis for a legitimate claim of privilege on any of the questions propounded." (A-3, *infra*). The court required that in claiming the privilege in the future, Appellant give a "statement in detail of his basis for the claim." (A-5, *infra*). It also compelled Appellant to choose between incriminating himself and being deprived of his cause of action:

> ". . . plaintiff will have to decide whether to answer such questions and possibly subject himself to the consequences of statutory violations, or refuse to answer and thereby preclude himself from pursuing claims against the defendant. . . ." (A-4, *infra*).

The court also indicated that if Appellant should persist in claiming the privilege against self-incrimination, his doing so would be deemed to be willful disobedience to the court's order. (A-5, *infra*). This opinion was affirmed in the Appellate Division (Unreported opinion, November 30, 1964).

On December 4, 1964, Appellees filed a Notice of EBT of Laverne, Inc., to take place on December 15. Notice was also filed with respect to Appellant Laverne, but he was not properly served. The hearing on December 15 was continued to December 17 and then to December 22. On December 17, counsel for Appellants informed the court that it was his understanding that it would not be proper for him to appear on December 22. He based this conclusion on his understanding of the effect of the corporation's bankruptcy status. Counsel for Appellees then stated that the presence of counsel for Appellants would be unnecessary. (Affidavit of Counsel for Appellants in Opposition to Order to Show Cause to Dismiss Complaint). Nevertheless, at the hearing on December 22, counsel for Appellees moved the court to note a default because of the absence of counsel for Appellants. The judge, who was not the same one who had presided on

December 17, granted the motion. (Transcript of December 22, 1964, Hearing, Exhibit to Ulman Affidavit in Support of Motion to Dismiss Complaints).

On December 16, Appellant Laverne was served with Notice of an EBT for December 28. However, because of counsel's uncertainty regarding the effect of the corporate bankruptcy, and because the trustee in bankruptcy had the books and records of the corporation, Appellant filed a Motion for a Protective Order, pursuant to CPLR § 3103, on December 21. Correctly understanding that the effect of the motion was to stay the EBT on December 28, Appellant did not appear. On February 15, 1965, the Nassau County Supreme Court granted a motion to dismiss the complaints. (A-6, *infra*). The court expressed the opinion that the Protective Order had been addressed to the wrong court, and that, in any event, it would not effect an automatic stay of the EBT. The Appellate Division affirmed. (A-10, *infra*).

The Court of Appeals, in its opinion filed July 7, 1966, disapproved of both these grounds. (A-13, *infra*). Consequently, the primary "default" on which dismissal could be based was that of Appellant Laverne in exercising his privilege against self-incrimination. Nevertheless, the Court of Appeals upheld as "a factual determination supported by the evidence" the finding of the Appellate Division that "Laverne's totality of conduct" evidenced a "willful failure to purge himself of his prior disobedience." (A-14, *infra*).

Recognizing that Appellant's assertion of the privilege against self-incrimination was a substantial, if not the sole, basis for deeming him in default under CPLR § 3126 and for dismissing the complaints under § 3126-(3), the Court of Appeals held the privilege to be unavailable to Appellant as a plaintiff at pre-trial discovery. The court rejected Appellants' argument that the statute, so construed and applied, violated the Fifth and Fourteenth Amendments. In so doing, the court made no ref-

erence to *Malloy v. Hogan*, 378 U.S. 1 (1946), although Appellants had specifically relied on *Malloy* in raising the federal question in their brief on appeal. Instead, the Court of Appeals rested its decision primarily on a pre-*Malloy* New York decision.[8] It also referred to a New York Appellate Division case and a Missouri case, both also pre-*Malloy*, but cited no applicable federal authority whatsoever.

THE QUESTION IS SUBSTANTIAL

Special Note: Spevack v. Klein and Garrity v. New Jersey were decided in this Court on January 16, 1967. This was while the present Statement was being printed, and only three days before its due date. Both these cases overwhelmingly support Appellants' position, and Appellants regret not having had the opportunity to rely upon them in the body of this Statement.

1. THE QUESTION IN ITS BROADER CONTEXT

This case presents the Court with the opportunity to provide clarification in an important but confused area of law. The issues are of significance to litigants in federal as well as state courts: To what extent are our developing discovery rules restricted by the privilege against self-incrimination? To what extent is imposition of sanctions for failure to obey discovery orders restricted by requirements of due process?

The New York discovery rules relevant to this case are similar to those of the Federal Rules of Civil Procedure, and therefore are also similar to discovery rules in over half the states. See *Note, Developments in the Law — Discovery*, 74 Harv. L. Rev. 940, 950 (1961). There is division among lower federal courts

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[8] *Levine v. Bornstein*, 13 Misc. 2d 161, 174 N.Y.S. 2d 574, *aff'd*, 7 A.D. 2d 995, 183 N.Y.S. 2d 868, *aff'd*, 6 N.Y.S. 2d 892, 190 N.Y.S. 2d 702, 160 N.E. 2d 921 (1958).

as to the applicability of the privilege against self-incrimination under Rule 36. See *Note, Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 326 (1966). A majority of state courts considering the problem under similar rules have denied the privilege to plaintiffs, despite "the absolute nature of the self-incrimination privilege [which] is guaranteed by the Constitution." *Ibid.*, at p. 333. Indeed, in deciding the consequences of claims of the privilege in civil cases, courts have rarely shown an awareness of the constitutional ramifications. *Ibid.*, at p. 335.

Apart from the self-incrimination aspects of the problem, the importance of the issue is accented by the due process consideration that "the whole discovery process has suffered" as a result of "the overbearing judge who abuses his discretion by imposing harsh sanctions." *Note, Sanctions for Enforcement of Disclosure — Constitutionality of Rule 37*, 37 Wash. L. Rev. 175, 183 (1962). Since the sanction in this case is the harshest of all — dismissal of the action — this case also presents the issue of whether a plaintiff may be compelled to elect between his constitutional privilege against self-incrimination, and his constitutional right to due process of law in litigating his cause of action on its merits.

In addition, there are strong public policy reasons for encouraging those who have grievances against public officials to seek redress in their State courts, as present Appellants have done. Too often such grievances have been protested in the streets rather than in the courts. However, if defendants in such cases can succeed in obtaining dismissals by seeking incriminatory information from plaintiffs, with the implicit threat of retaliation through criminal prosecutions, the orderly redress of such grievances through judicial proceedings could be wholly frustrated.

2. THE QUESTION IN THE CONTEXT OF THIS CASE

The privilege against self-incrimination is available to parties in civil cases at pre-trial discovery. This was long ago recognized in a decision for a unanimous Supreme Court by Chief Justice Marshall: "The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties . . . ." *United States v. Saline Bank of Virginia*, 1 Pet. 100, 26 U.S. 100, 104 (1828). The rule is no less clear under modern discovery procedure: "A party in answering a request for admission of facts under [Rule 36 of the Federal Rules of Civil Procedure] is entitled to the same constitutional protection as if called as a witness, and may refuse to admit incriminating facts. . . ." Barron & Holtzoff (Wright ed.) § 834, p. 516. The privilege is applicable to same extent in State proceedings. *Malloy v. Hogan*, 378 U.S. 1 (1964).[9]

Just as clearly, the property right in a cause of action is protected by requirements of due process. *Kentucky Finance Co. v. Paramount Exchange Corp.*, 262 U.S. 544 (1923). "The rights of a litigant to be heard is one of the fundamental rights of due process of law." *Council of Federated Organizations v. Mize*, 339 F.2d 898 (5th Cir., 1964), citing *Hovey v. Elliott*, 167 U.S. 409 (1897). *Cf. Societe Internationale v. Rogers*, 357 U.S. 197 (1958).

The Court of Appeals of New York has construed and applied its discovery statutes in such a way as to compel Appellants to forego one of these basic rights in order to maintain the other. As expressed by the lower court judge in the opinion affirmed below, ". . . plaintiff will have to decide whether to answer such questions and

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[9] Since the New York courts failed to recognize *Malloy v. Hogan* or any other applicable federal authority in rejecting the claim of the privilege, summary reversal would not be inappropriate. *Cf. United States v. Haley*, 358 U.S. 644.

possibly subject himself to the consequences of statutory violations, or refuse to answer and thereby preclude himself from pursuing his claims against the defendant . . . ." (A-4, *infra*).[10]

This is the very result disapproved by a unanimous decision (8-0) of this Court in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). There the Government defended an Alien Property case on the ground that the petitioner was an "enemy" within the Act because of covert control by I. G. Farben. The Government sought discovery of relevant documents, but petitioner resisted on the ground that compliance with the discovery order "might" have led to criminal sanctions in Switzerland. *Societe*, at p. 200. The District Court found that the documents at issue could be "crucial" and have a "vital influence" upon the litigation. *Societe*, at pp. 201, 205. It therefore dismissed the complaint because of petitioner's failure to comply with the discovery order.

In reversing dismissal of the complaint, this Court reaffirmed that "There are constitutional limits upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Societe*, at p. 209. The Court noted that "any reasonable showing of an inability to comply" precludes dismissal, and found fear of prosecution to be "a weighty excuse"

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[10] There is irony as well as unconstitutionality in this result, since ". . . one of the primary aims of procedural reform has been to diminish the possibility of a judgment for procedural defaults, such as discovery noncompliance, and to ensure that most cases are decided on their merits." *Note, Developments in the Law — Discovery*, 74 Harv. L. Rev. 940, 990-991 (1961).

"If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried on to an adjudication on the merits." *Surowitz v. Hilton Hotel Corp.*, 383 U.S. 363, 373 (1966).

for non-production. *Societe*, at p. 211.[11] Present Appellants, who have been subjected to repeated prosecutions by Appellees over a period of more than ten years (see *supra*, pp. 5-6), have better reason than petitioners in *Societe* to fear prosecution should they incriminate themselves on depositions. Indeed, information obtained by discovery might succeed where information obtained by unlawful searches has failed. See *supra*, p. 6, especially para. numbered 6.

In effect, the decision below has imposed an unconstitutional condition (foregoing the privilege against self-incrimination) on the privilege of access to New York courts. A close parallel is *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922). There this Court unanimously held that a State may not condition the privilege of doing intrastate business on the relinquishment of the constitutional right to litigate in federal courts. Similarly, this Court has held that it was a denial of due process to nonsuit a plaintiff corporation for refusing to comply with discovery rules that unfairly discriminated against it with regard to service of notice and subpoena, and location of taking depositions. *Kentucky Finance Co. v. Paramount Exchange Corp.*, 262 U.S. 544 (1923).[12]

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[11] The Court distinguished direct violation of foreign law from self-incrimination under foreign law, citing *United States v. Murdock*, 284 U.S. 141 (1931). However, the two-jurisdiction rule of *Murdock* was overruled in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), in order to broaden the protection of the privilege against self-incrimination consistent with its underlying policies. The clear implication of the Court's distinction of *Murdock* in *Societe* is that self-incrimination under domestic law is equally an excuse for refusal to discover.

[12] Compare also *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), holding it to be a violation of due process to dismiss a teacher for invoking the privilege before a United States Senate committee. *Lerner v. Casey*, 357 U.S. 468 (1958) upheld dismissal of an employee who claimed the privilege in a city investigation. However, the Court in *Lerner* noted that "the federal privilege against self-incrimination was not avail-

The only case in this Court that might appear to be inconsistent with Appellants' position is *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1908). There a defense was stricken because defendant refused to produce certain books. *Hammond* was explained in *Societe* as a case in which "the State simply utilized a permissible presumption that the refusal to produce material evidence" was equivalent to "an admission of the want of merit in the asserted defense." *Societe* at p. 210. The Court went on to note, however, that "Certainly substantial constitutional questions are provoked" by striking a complaint where the *Hammond* presumption may be inappropriate. *Ibid.*[13] In the present case such a presumption would be most inappropriate, since there is no rea-

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able to the appellant through the Fourteenth Amendment in this state investigation." (at p. 478). Since *Malloy v. Hogan*, 378 U.S. 1 (1963), therefore, "the continued vitality of *Lerner* is highly doubtful." *Note, Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 337 (1966).

"The minimum inference from the *Slochower* line of cases, at least since *Malloy*, is that neither a state nor a federal court may strike a defendant's pleadings because of his assertion of the privilege with regard to some question in the case." *Ibid.*, at p. 339.

Although Appellants were plaintiffs below, just as in *Societe*, *supra*, their position is analogous to that of a defendant. Compare the following language from *Societe*, at pp. 210-211:

> "[The gravity of the substantial constitutional questions] is accented in the present case where petitioner, though cast in the role of *plaintiff*, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate the rights asserted against another. Rather, petitioner's position is more analogous to that of a *defendant*, for it belatedly challenges the Government's action by now protesting against a seizure and seeking the recovery of assets which were summarily possessed . . . without the opportunity for protest by any party claiming that seizure was unjustified. . . ."

[13] ". . . A party should not be deprived of his day in court on the ground of a conclusive presumption raised by his use of the privilege." *Note, Use of the Privilege against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 338 (1966).

"It is apparent that a constitutional prohibition cannot be

sonable basis for infering that incriminating answers would have adversely affected Appellant's case.

Moreover, the authority of *Hammond* is substantially impaired by the fact that the privilege against self-incrimination was not then applicable against the States. See *Malloy v. Hogan*, 378 U.S. 1 (1964). The primary contention in *Hammond* was unlawful search and seizure, but *Hammond* also preceded *Mapp v. Ohio*, 367 U.S. 643 (1961), *Wolf v. Colorado*, 338 U.S. 25 (1949),[14] and even *Weeks v. United States*, 232 U.S. 383 (1914).

The decisions below also disregard the well established rule that where State action infringes on a constitutional right, the infringement must be "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964) (see also Justice Harlan's concurrence at p. 197). In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), this Court invalidated the State regulation on the ground that it was not "essential" to health protection, in view of reasonably adequate alternatives to the same end. *Ibid.*, at p. 356.

In the present case, discovery through depositions was neither necessary nor justifiable. There were other sources readily available to Appellees.[15] The majority of the questions asked at the EBT related to information that was of public record (*e.g.*, those relating to incor-

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transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." *Bailey v. Alabama*, 219 U.S. 219, 239 (1911), quoted in *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

[14] In *Adams v. New York*, 192 U.S. 585 (1904), just four years before *Hammond*, the Court had held that State use of unlawfully seized papers violated neither the right against unlawful search and seizure nor the privilege against self-incrimination.

[15] Compare *Mayo v. Ford*, 191 A.2d 603 (D.C. Mun. App. 1963). After discovery regarding an earlier bigamous marriage had been blocked by a claim of self-incrimination, the petitioner succeeded without discovery by producing the first wife.

poration of Laverne, Inc.).[16] The only approach to an offer of proof or specification of need made by Appellees was the assertion that information was desired to determine "whether any such trade or other secrets were or are carried as assets of the corporation" and "whether the corporation has suffered any loss of profits as a result of the alleged deprivation of such secrets." (Ulman Affidavit in Support of Motion to Dismiss Complaints, para. 18). That is, the only asserted ground for Appellees' discovery was to determine how effectively Appellants might be able to maintain Appellants' burden of proof regarding damages. At least in the face of a clear claim of constitutional privilege, as here, the party seeking discovery should be under a burden to make a "clear showing" that the inquiry is designed to uncover facts which would "in all probability relieve him of liability."[17] *Note* [on *Levine v. Bornstein*], 107 Pa. L. Rev. 426, 429 (1959).

The New York courts in this case have taken a contrary approach: the party seeking discovery need not make a showing of need, but the party claiming the privilege against self-incrimination must give a "statement

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[16] Others were of doubtful relevance or propriety, *e.g.*, whether Appellant had ever seen the complaint. *Cf. Surowitz v. Hilton Hotel Corp.* 383 U.S. 363 (1966).

[17] In this respect, *Levine v. Bornstein*, *supra*, relied upon by the Court of Appeals, is perhaps supportable, although clearly distinguishable from the present case. There the affirmative defense was set forth that the plaintiff had unlawfully purchased the cause of action, four days prior to expiration of a twenty-year statute of limitations, for the purpose of suing on it. Plaintiff himself was apparently the only source of information to adequately establish this defense. Compare *Bernat v. Pennsylvania Railroad Company*, 14 FRD 465 (E.D. Pa. 1953), where the court refused to enter a default judgment, because plaintiff had failed to show that the document sought was "vital" or that his case would be "hindered or impaired." *Ibid.*, at p. 466.

in detail of his basis for the claim." (A-6, *infra*).[18] The constitutional rule, of course, is clearly otherwise: one need not "surrender the very protection which the privilege is intended to guarantee" in order to assert it. *Malloy v. Hogan*, 378 U.S. 1, 12-13 (1964). In the setting of the extensive prosecutions of Appellants by Appellees, even the explanation given by counsel for Appellants at the EBT (*supra*, p. 7) was superfluous. *Ibid.*

In addition, other formal discovery procedures were available to Appellees, who failed to pursue them. These include a bill of particulars (CPLR § 3041), stipulations (CPLR § 3102), written interrogatories (CPLR § 3130), and depositions on written questions (CPLR § 3108). One major advantage of these procedures, as against oral depositions, is that they minimize the possibility of inadvertent waiver of the privilege against self-incrimination by answering preliminary questions. Inadvertent waiver is, of course, entirely possible at pre-trial discovery. *Note, Use of the Privilege against Self-Incrimination in Civil Litigation*, 52 Va. L. Rev. 322, 328 (1966). As this Court has observed, "incrimination may be approached and achieved by obscure and unlikely lines of inquiry." *Malloy v. Hogan, supra*, at p. 13, n. 9, quoting *United States v. Coffey*, 198 F.2d 438 (3d Cir., 1952). This fact alone could well explain and justify the asserted intention of Appellants' counsel to instruct his client not to answer any questions at the oral deposition.

Moreover, there are reasonably adequate alternative sanctions available to preclude any unfairness to Appellees in Appellants' claim of the privilege. "A default judgment cannot be entered unless the failure to produce goes to matters which are the essence of the case." *Note, Sanctions for Enforcement of Discovery — Consti-*

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[18] The court was more solicitous with respect to compelling Appellants to divulge trade secrets, as to which the Appellees were required to make a showing that the information would be "indispensable" to ascertaining the truth. (A-5, *infra*).

tutionality of Rule 37, 37 Wash. L. Rev. 175, 179 (1962). By requiring an offer of proof by the party seeking discovery, as suggested above, the court can also put itself in a position to fit the sanction to the needs of fairness. Less harsh sanctions than dismissal include forbidding the party resisting discovery to later introduce the evidence or documents sought. See *Bernat v. Pennsylvania Railroad Company*, 14 FRD 465, 466 (E.D. Pa., 1953). Also, discovery may be found critical to only one count, which might then be dismissed, without dismissing other counts. Another alternative would be to permit the finder of fact to draw adverse inferences from the failure of a party to provide discovery. See *Societe Internationale v. Rogers*, 357 U.S. 197, 213 (1958).

Finally, consideration might be given by this Court to eliminating the doctrine of waiver in civil pre-trial discovery, to avoid the threat of inadvertent waiver. Another possibility is to require that where a State compels discovery — at least, as here, in cases seeking redress of grievances against public officials — the plaintiff must be granted immunity from subsequent prosecution. *Cf. Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); Finman, *The Request for Admissions in Federal Civil Procedure*, 71 Yale L. Jour. 371, 384 (1962).

CONCLUSION

Accordingly, Appellants respectfully submit that the question is substantial and of considerable importance to litigants in federal as well as in state courts.

Respectfully submitted,

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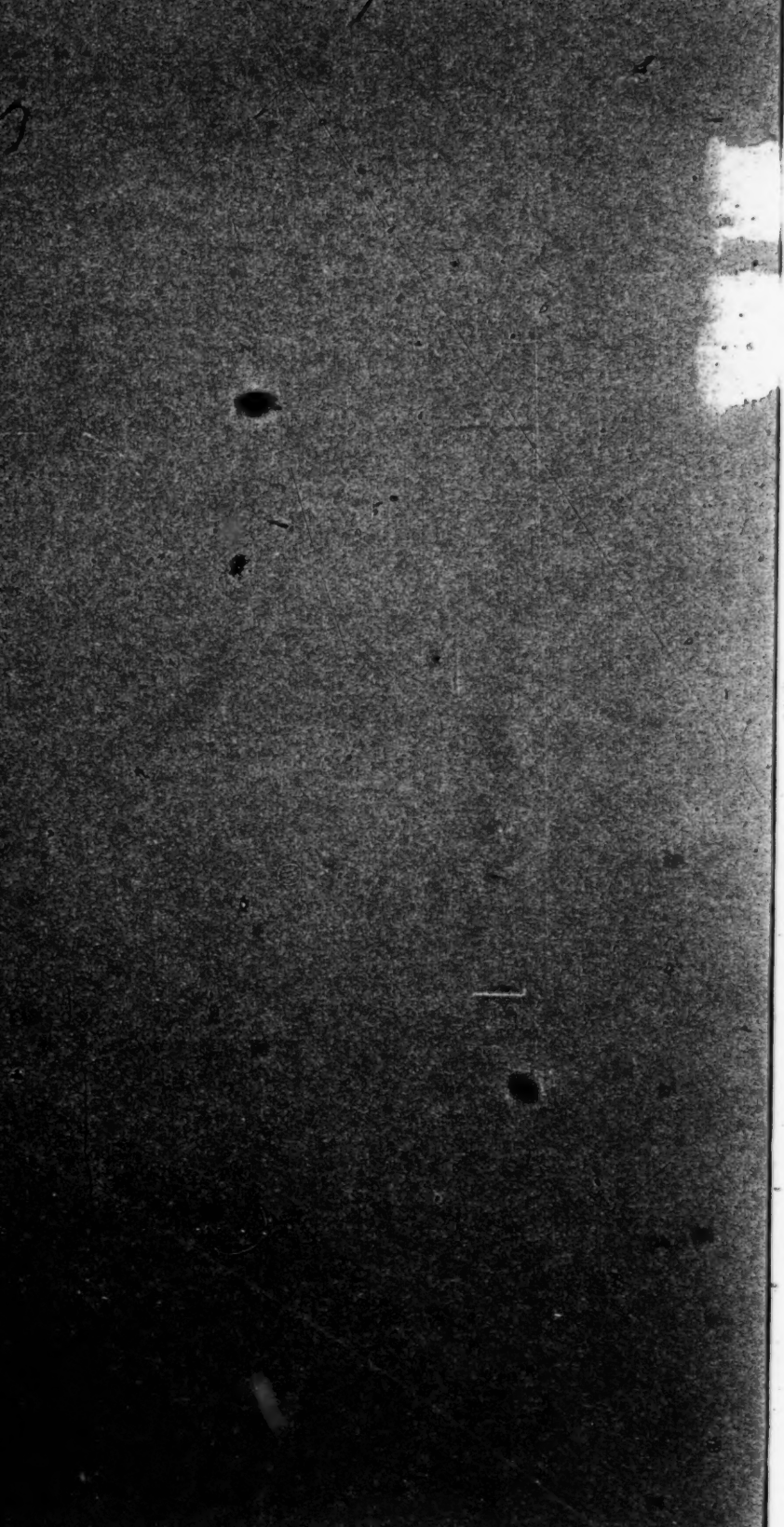
CERTIFICATE OF SERVICE

I, Monroe H. Freedman, Esq., attorney for Appellants in the foregoing matter, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 19, 1967, I served the foregoing Jurisdictional Statement on Appellees, by mailing a copy thereof by first-class airmail, postage prepaid, to their attorneys of record as follows: Sprague, Dwyer, Aspland & Tobin, attorneys for individual Appellees, 220 Old County Road, Mineola, New York; and Thomas C. Platt, Esq., attorney for Appellee Incorporated Village of Laurel Hollow, 146 Old County Road, Mineola, New York.

MONROE H. FREEDMAN
Attorney for Appellants



APPENDIX

NASSAU COUNTY SUPREME COURT ORDER, May 7, 1964

Upon the foregoing papers it is ordered that this mo-
on is denied.

One of the recognized purposes for an examination
efore trial is to prepare a defense to an action. As to
ossible self-incrimination, this privilege must be
aimed by the witness at the time a particular question
which it applies is asked.

The defendant Erwine Laverne is directed to appear
nd be examined at a Special Term, Part II of this court,
Willis Avenue, Mineola, New York, on May 29, 1964,
10 A. M.

Entered
May 7, 1964

Francis J. Anderson
ounty Clerk of Nassau County

Dated May 7, 1964

/s/ FRANK A. GULOTTA.
J.S.C.

NASSAU COUNTY SUPREME COURT OPINION, September 1, 1964

This is a motion by defendants to strike the complaint
the plaintiffs in both actions by reason of the wilful
efusal of one of them to answer questions on an exam-
ation before trial. The defendants rely on § 3126 of
e CPLR and on the authority of *Levine v. Bornstein*
3 Misc. 2d 161, aff'd 7 A.D.2d 995, aff'd 6 N.Y.2d 892).
two actions plaintiffs have sued the defendants for sub-
antial damages ($2,150,000.00) for alleged deprivation
trade secrets, for trespass, "common law prima facie

tort of interference with property rights", and breach of an implied covenant of quiet enjoyment. The defendants for their answers have interposed general denials.

The order compelling disclosure entered in the first action appears to be limited in application to the plaintiff Erwine Laverne. No order was procured in the second action, and no examination of the plaintiff, Estelle Laverne, has been sought in either action. The motion, insofar as it is directed against her, is denied in its entirety. However, the views expressed and the holdings herein will be equally applicable and pertinent on any examination before trial which may hereafter be had of the plaintiff Estelle Laverne in these actions. The assertion of a claim of privilege in a manner inconsistent with this opinion will be deemed a wilful refusal sufficient to warrant a dismissal of the plaintiff's complaint.

As to the corporate plaintiff, there is no adequate showing that the plaintiff Erwine Laverne was also being examined on behalf of the corporation or that the corporation would refuse to appear by some other person having knowledge of the facts. The drastic remedy of striking a party's pleading should not be exercised on insufficient proofs. Under the circumstances disclosed, the motion as to the corporate plaintiff is also denied.

The submitted papers, however, affirmatively disclose that the corporate plaintiff is asserting a claim of privilege. To avoid a repetition of this motion against the corporation, in denying this motion the Court observes and holds that the claim of privilege as herein asserted is not available to the corporate plaintiff (*Radin v. Kornreich*, 17 Misc. 2d 860). To assert it on any examination before trial to be held hereafter of the corporate plaintiff will be a wilful refusal which will warrant a dismissal of the corporate plaintiff's actions.

At the time of his examination, the plaintiff Erwine Laverne asserted his constitutional privilege against self-incrimination and declined to answer any question other than his name, or to produce any records of the corporate plaintiff. In an order dated May 7, 1964, one

of the Justices of this Court denied plaintiff's motion to vacate the notice of examination before trial, stating: "One of the recognized purposes for an examination before trial is to prepare a defense to an action. As to possible self-incrimination, this privilege must be claimed by the witness at the time a particular question to which it applies is asked." It was pursuant to this order that the plaintiff appeared to be examined, and thereupon refused to answer any question propounded except to state his name.

In contesting this motion, this plaintiff again contends that defendant should not be permitted to examine him "to prepare both for trial and a defense therein". This argument has already been refuted by the aforesaid order of Mr. Justice Gulotta and is, of course, directly contrary to the express language of § 3101(a) of the CPLR, which very clearly states that "there shall be full disclosure of all evidence material and necessary in the prosecution or *defense of an action, regardless of the burden of proof*" (Emphasis supplied). The cases cited by plaintiff pre-date both the C. P. A. and the C. P. L. R., which changed the law on this subject.

The Court possesses inherent as well as statutory power to strike the complaint and dismiss the action for the plaintiff's deliberate and wilful refusal to comply with the orders of the Court (*Levine v. Bornstein, supra*, § 3126, CPLR). The refusal of the plaintiff Erwine Laverne here to answer any questions propounded to him deprives the defendants of an opportunity to shape their defenses to meet his claim.

A careful examination of the transcript in the light of the nature of the proceedings and the history of extended and extensive litigation between the plaintiffs and defendant Village fails to reveal any basis for a legitimate claim of privilege on any of the questions propounded. The Court is at a loss to understand how an answer to any of the questions posed could tend to incriminate the plaintiff and the plaintiff has failed to enlighten this Court or the defendants on this score. Such rights as

the plaintiff may have to claim the privilege were in any event prematurely and improperly exercised.

However, in the exercise of its discretion the Court will not grant the relief requested here as to this plaintiff on condition that this plaintiff purge himself of his disobedience of the prior order of the Court by reappearing to be examined and making answers to the questions already asked and those to be asked in a manner not inconsistent with the views herein expressed.

The Court is mindful and anticipates that among the prospective questions may be some to which the answers may possibly incriminate this plaintiff. With this expectation, plaintiff will have to decide whether to answer such questions and possibly subject himself to the consequences of statutory violations, or refuse to answer and thereby preclude himself from pursuing his claims against the defendant if the matters or evidence which plaintiff may choose to withhold are necessary, material and relevant to defendant's defense of these actions. In *Levine v. Bornstein, supra,* it was clear that the answers to the questions asked would incriminate the plaintiff and defeat plaintiff's claim. Here it will not be clear until an incriminating question is asked whether the exercise of the privilege against self-incrimination will necessarily thwart the defendant's means of refuting the claim. If it does, then the rationale of the *Levine* case will be applicable and pertinent with equal force and effect. The interests of justice will not be served by extending the protection of privilege to the plaintiff, who on one hand seeks affirmative relief and with the other declines to answer questions pertinent and material to defendant's defense of the action (*Levine v. Bornstein, supra*).

To avoid further and unnecessary motion practice, the order to be submitted hereon, or any other orders or notices for other examinations of the plaintiffs in both actions, will provide that they shall be held at the

Courthouse, so that rulings on the claim of privilege may be obtained as the examination progresses and the privilege is claimed. The plaintiff will have ample opportunity at the time an incriminating question is asked to claim the privilege, and upon statement in detail of his basis for the claim, obtain a ruling. In the event plaintiff persists in claiming this privilege in the manner evidenced at the prior hearing and otherwise inconsistent with these opinions, then plaintiff shall be deemed to have wilfully disobeyed the order to be entered hereon and the prior order, and the complaint will be dismissed on notice to this Court by affidavit and a copy of the transcript of such conduct.

Another ground asserted on this motion by plaintiff for resisting the defendant's questions on an examination before trial is that he may not be compelled to disclose information as to his trade or artistic secrets on this examination except on a showing that same is indispensable to the ascertainment of truth or otherwise legitimately necessary, citing *Drake v. Hermann* (261 N.Y. 414) and *N.D.Q. Specialty Corp. v. Cypress Novelty Corp.* (250 A.D. 881). Neither the defendants nor the Court take issue with this proposition of law. However, defendants never reached the point in the abortive pre-trial examination of making inquiry into anything remotely relating to trade secrets. Even if they had, plaintiff, judging by his own statements, would undoubtedly have asserted the privilege against self-incrimination.

Defendants have stated that it is not their intention to make inquiries that would require plaintiffs to reveal in detail the nature of the alleged secrets and processes. However, they do intend to ask plaintiffs to identify the secrets they claim were violated, their value, to whom other than plaintiffs they are known, what measures have been taken by plaintiffs to protect them, what use plaintiffs have made of them, who among defendants has appropriated them, what use it is claimed defendants made of them, and the manner in which plaintiffs compute their damages. All of these are proper areas of inquiry under

the liberal language of Article 31 of the CPLR and the many case holdings interpreting it and its predecessor Article 29 of the CPA.

Assuming, however, that defendants seek to inquire beyond the area just described, plaintiff will have ample opportunity at the time the specific questions are asked to make appropriate objections, stating in detail the ground for each. (See *Griffin Mfg. Co. v. Gold Dust Corp.*, 245 A. D. 385.) Further, if either party be so advised, that party may make application for the appointment of a referee to supervise the examination and, among other things, to impose appropriate safeguards against disclosure of trade secrets (see *American Seal-Kap Corp. v. Smith Lee Co.*, 154 Misc. 176, aff'd 248 A. D. 617).

The opinions expressed herein apply with equal effect and force in the second cause of action, even though no order of examination as to this plaintiff may have been heretofore applied for or obtained.

Settle order on notice.

SUOZZI,
J.S.C.

NASSAU COUNTY SUPREME COURT OPINION,
February 15, 1965

Motion by plaintiffs and defendants for reargument of decision of the court, rendered on January 18, 1965 in connection with defendants' application for an order striking the complaint of the plaintiffs Laverne, Inc. and Erwine Laverne for alleged wilful failure to attend disclosure proceedings. The decision was based on the erroneous factual assumption that the corporate plaintiff, prior to the date scheduled for its examination pursuant to notice, had served a motion for a protective order. An application for such relief was actually made

on behalf of the individual plaintiff, Erwine Laverne, and this circumstance necessitates reconsideration of the papers. Both motions for reargument are granted, and the decision dated January 18, 1965 is recalled and vacated. The defendants original motion, and the subsequent motion by the plaintiff, Erwine Laverne, for a protective order which has been referred to me by Special Term, Part I, are hereinafter considered together.

On September 1, 1964 this Court (Suozzi, J.) denied defendants' motion to dismiss the complaint of Erwine Laverne on condition he purge himself of disobedience of a prior order of Mr. Justice Gulotta, entered on May 7, 1964, by appearing for examination before trial and answering relevant questions. The order was affirmed (22 A.D.2d 826), and the Appellate Division directed such plaintiff to submit to examination on a date to be fixed either by stipulation or by written notice served on the plaintiff's attorneys. Such notice was served on December 16, 1964 and scheduled the examination for December 28, 1964. Prior thereto, a written notice was also served to take the deposition of the corporate plaintiff, and by agreement the examination was adjourned to December 22, 1964. Neither plaintiff appeared for examination on the aforesaid dates, but the individual plaintiff on December 21, 1964 served a motion to vacate his examination on the grounds the notice was defective because it called for the production of books and records of the corporate plaintiff and testimony relating to its causes of action. The corporate plaintiff is an adjudicated bankrupt, and the plaintiff Erwine Laverne contends that no records or testimony may be elicited on its behalf from him without the authorization or consent of the trustees in bankruptcy. The individual plaintiff further asserts his attorneys have been deprived of authority to represent the bankrupt corporation and that the notice to examine the corporation served on them rather than the trustees in bankruptcy is a nullity. Although the trustees in bankruptcy have not intervened in the action,

the contention is made that they alone may act on behalf of the bankrupt.

The Bankruptcy Act (11 U.S.C.A. § 29-c) permits a trustee with approval of the court to prosecute any suit commenced by the bankrupt prior to the adjudication. The statute does not mandate such intervention, and the decision is left to the discretion of the trustee for the reason that he is not bound to accept burdensome or unprofitable litigation (*Van der Stegen v. Neuss, Hesslein & Co., Inc.*, 270 N.Y. 55, 59-60; see also, *D. & D. Co. v. Clapper*, 87 F. Supp. 365 (W.D. Mo.); *American Foods, Inc. v. Dezauche*, 74 F. Supp. 681 (W.D. N.Y.)). A plaintiff's adjudication in bankruptcy, however, does not abate his action, and the trustee's refusal to take up the prosecution does not release the defendant from the bankrupt's claim. (*Van der Stegen v. Neuss, Hesslein & Co. Inc., supra.*) The express or implied refusal or failure of the trustee to intervene in the action simply serves to cloak the bankrupt with authority to continue the litigation on his own. (In re *Prudence Co. Inc.*, 96 F.2d 157 (2d Cir.), cert. den. 305 U.S. 616; *D. & D. Co. v. Clapper, supra; American Foods, Inc. v. Dezauche, supra*). The foregoing principles make clear that a plaintiff's adjudication does not benefit a defendant, and it should be equally certain that it cannot work to the advantage of the bankrupt and to the defendant's prejudice by allowing him to escape the burdens attaching to the litigation which he instituted. Consequently, so long as the trustee does not intervene, there is no validity to the contention that the authority and employment of the corporation's attorneys terminated with its adjudication (In re *Prudence Co. Inc., supra.*).

In the present case, there is sufficient evidence to indicate the trustee was apprised of the bankrupt corporation's action, and that he had a reasonable time to indicate whether or not he would intervene. His silence is indicative of his consent to the bankrupt's continuation of the action particularly in view of the order obtained by the trustee in the Federal Court staying all

proceedings *against* the bankrupt without inclusion of actions *brought by* the bankrupt. There is also ample evidence that the attorneys who commenced this action in behalf of the corporation had notice of its adjudication long before the service of defendant's notice of examination. They cannot sit back idly and ignore the knowledge which such notice imparted, and at this late date frustrate the defendant's preparation of their defense by asserting the bankruptcy as a shield to the examination. The corporate plaintiff's failure to attend for disclosure under the circumstances is wilful and prejudicial to the defendants' rights, and its complaint is stricken (*Levine v. Bornstein*, 7 A.D.2d 995, aff'd 6 N.Y.2d 892; see also, *Hazlett v. Bullis*, 12 A.D.2d 784).

The preceding discussion makes readily apparent the inadequacy of the individual plaintiff's claim to exemption from examination by reason of the corporate plaintiff's bankruptcy. This plaintiff, in addition, however, advances the position that service of his motion for a protective order automatically stayed all disclosure proceedings (CPLR 3103-b). The cited rule has no application to this case. The individual plaintiff, Erwine Laverne has been thrice ordered to appear for examination and a stay or modification of the last order made by the Appellate Division of the Supreme Court should properly have been addressed to and made returnable in that court. The service of the motion in this court was a nullity.

The bankruptcy of the corporate plaintiff in no event could deprive the defendants of their right to examine the individual plaintiff, and at best may have served to excuse his non-production of corporate records in the exclusive possession of the trustees in bankruptcy. The individual plaintiff may have readily explained his inability to comply in this respect, but he elected instead to refuse to comply with the orders of this Court, and the Appellate Division. The Court finds his failure to appear was wilful and deliberate, and evidenced conduct intended to harass and impede the defendants. The com-

plaint of the plaintiff Erwine Laverne is, therefore, stricken (CPLR 3126), and the motion of the defendants, on reargument, is granted in its entirety. The application of the plaintiff Erwine Laverne for a protective order is denied accordingly.

Submit separate orders and settle on notice.

J.S.C.

APPELLATE DIVISION OPINION,
February 28, 1966

LAVERNE v. INCORPORATED VILLAGE OF LAUREL HOLLOW----------In two actions to recover damages for conspiracy to deprive plaintiffs of their trade secrets and property rights, and for other relief, in which (a) two orders of the Supreme Court, Nassau County, were entered February 15, 1965, one of which denied plaintiffs' motion for a protective order and the other of which upon reargument granted defendants' motion to dismiss the complaints of the plaintiffs Erwine Laverne and Laverne, Inc., pursuant to statute (CPLR 3126, subdiv. 3); and (b) a judgment of said court was entered February 24, 1965, pursuant to the second-mentioned order, the plaintiff Erwine Laverne appeals from the first-mentioned order and the plaintiffs Erwine Laverne and Laverne, Inc., appeal from the second-mentioned order and from the judgment. The first-mentioned order is affirmed, with $10 costs and disbursements payable by the appellant Erwine Laverne. The second-mentioned order and the judgment are modified to the extent of adding a provision on each directing that (a) a copy of said order and judgment, with notice of entry, be served by defendants upon the trustee in bankruptcy of the corporate plaintiff and upon the attorneys for the trustee; (b) the trustee is given leave to apply to the Special Term, on notice, for permission to prosecute the action of the

corporate plaintiff, and, (c) in the event the trustee makes such application and is granted such permission, the judgment, in so far as it dismisses the complaint of the corporate plaintiff, shall be deemed set aside as to it. As so modified, said order and judgment are affirmed without costs. Defendants shall also serve upon the trustee and his attorneys a copy of the order hereon, with notice of entry. Service of said papers upon the trustee and his attorneys shall be effectuated within ten days after entry of the order hereon; and the time within which such application by the trustee may be made is limited to ninety days after such service. In our opinion there is ample evidence that plaintiff Erwine Laverne has willfully failed to purge himself of his prior disobedience of an order directing him to submit to a pre-trial examination (see Laverne v. Incorporated Village of Laurel Hollow; Laverne v. Meehan, 22 A.D.2d 826). We are of the same opinion with respect to the conduct of plaintiff Erwine Laverne and his attorney in failing to submit the corporate plaintiff to a duly-noticed pre-trial examination. We find, however, that the record does not sufficiently demonstrate that the trustee in bankruptcy of that plaintiff does not intend to assume prosecution of the bankrupt's action. We therefore extend an opportunity to the trustee to continue the action (U.S. Code, title 11, sec. 29 subdiv. (c)).

APPELLATE DIVISION ORDER, February 28, 1966

At a Term of the Appellate Division of the New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 28th day of February, 1966

The above named Erwine Laverne a plaintiff in above actions having appealed to this court from an order of the Supreme Court entered in the office of the Clerk of the County of Nassau on February 15, 1965, which denied plaintiffs' motion for a protective action; and the above named Erwine Laverne and Laverne, Inc., plaintiffs in said actions having appealed from an order of said court entered February 15, 1965 upon reargument granting defendants' motion to dismiss the complaints of the plaintiffs Erwine Laverne and Laverne, Inc., pursuant to statute (CPLR 3126, subd. 3); and from judgment entered in said Clerk's office on February 24, 1965 pursuant to the latter order; * * * and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed and made a part hereof:

It is Ordered that the order denying plaintiffs' motion for a protective order, so appealed from be and the same hereby is unanimously affirmed, with $10 costs and disbursements payable by the appellant Erwine Laverne; and it is further

Ordered that the order entered upon reargument and the judgment so appealed from are modified to the extent of adding a provision in each directing that (a) a copy of said order and judgment, with notice of entry, be served by defendants upon the trustee in bankruptcy of the corporate plaintiff and upon the attorneys for the trustee; (b) the trustee is given leave to apply to the Special Term, on notice, for permission to prosecute the action of the corporate plaintiff; and, (c) in the event

the trustee makes such application and is granted such permission, the judgment, insofar as it dismissed the complaint of the corporate plaintiff, shall be deemed set aside as to it; and it is further

Ordered that as so modified, said order and judgment are unanimously affirmed, without costs; and it is further

Ordered that defendants shall also serve upon the trustee and his attorneys a copy of this order with notice of entry; that the service of said papers upon the trustee and his attorneys shall be effectuated within 10 days after entry of this order; and that the time within which such application by the trustee may be made is limited to 90 days after such service.

Enter:

HERMAN M. POGUL

Acting Clerk

STATE OF NEW YORK COURT OF APPEALS
OPINION, July 7, 1966

Notwithstanding the lower court's error in determining that plaintiff's motion for a protective order pursuant to CPLR 3103 should have been addressed to the Appellate Division, rather than to the trial court, the court properly dismissed the complaint — in the sound exercise of its judicial discretion — because of plaintiff's willful failure to purge himself of his disobedience of prior court orders compelling disclosure on matters relevant to his causes of action and defenses thereto (CPLR 3126). And while it is true that plaintiff's 3103 motion automatically suspended all disclosure proceedings regarding the particular matter to be disclosed, the making of such a motion did not in any way immunize Laverne from the dismissal of his complaint. The Appellate Division affirmed this dismissal because La-

verne's totality of conduct evidenced a willful failure "to purge himself of his prior disobedience," a factual determination supported by the evidence and beyond the scope of this court's review.

As to plaintiff's constitutional argument that by compelling disclosure the court is denying him the privilege against self-incrimination, the issue was thoroughly discussed and resolved in *Levine v. Bornstein* (13 Misc. 2d 161 [S. Ct., 1958], aff'd 7 A.D.2d 995 [2d Dept.], aff'd without opinion, 6 N. Y. 2d 892 [1959]). The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt by defendant at a pre-trial discovery proceeding to obtain information relevant to the cause of action alleged and possible defenses thereto. (See, also, *Franklin v. Franklin*, 365 Mo. 442; *Hazlett v. Bullis*, 12 A.D.2d 784 [2d Dept. 1961]).

The order of the Appellate Division should be affirmed.

Chief Judge Desmond and Judges Fuld, Van Voorhis, Burke, Scileppi, Bergan and Keating concur.

Order affirmed.

Office-Supreme Court, U.S.
FILED
MAR 14 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 984

ERWINE LAVERNE, ESTELLE LAVERNE and LAVERNE, INC.,
Appellants,

v.

INCORPORATED VILLAGE OF LAUREL HOLLOW and HOWARD CORNING, JR., individually, and as Mayor of the Incorporated Village of Laurel Hollow; and HUTCHINSON DUBOSQUE, ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, individually, and as Trustees of the Incorporated Village of Laurel Hollow; and MARTIN DWYER, individually and as Chairman of the Planning Board of the Incorporated Village of Laurel Hollow; and HUGH JOHNSON, individually, and as Building Inspector of the Incorporated Village of Laurel Hollow; and EDWARD J. MEEHAN, individually, and as Police Sergeant of the Incorporated Village of Laurel Hollow,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS,
STATE OF NEW YORK

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 984

ERWINE LAVERNE, ESTELLE LAVERNE and LAVERNE, INC.,
Appellants,

v.

INCORPORATED VILLAGE OF LAUREL HOLLOW and HOWARD CORNING, JR., individually, and as Mayor of the Incorporated Village of Laurel Hollow; and HUTCHINSON DUBOSQUE, ORIN LEACH, JOHN MACKAY and DOUGLAS DESPARD, individually, and as Trustees of the Incorporated Village of Laurel Hollow; and MARTIN DWYER, individually and as Chairman of the Planning Board of the Incorporated Village of Laurel Hollow; and HUGH JOHNSON, individually, and as Building Inspector of the Incorporated Village of Laurel Hollow; and EDWARD J. MEEHAN, individually, and as Police Sergeant of the Incorporated Village of Laurel Hollow,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS,
STATE OF NEW YORK

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that this appeal from an order of the New York Court of Appeals, entered on July 7, 1966, be dismissed on the grounds that the order rests on an adequate non-federal basis and that Appellant is not the real party in interest and may not maintain this appeal.

Opinions Below

The opinions and orders of the courts below are found at pages A-1 through A-14 of the Appendix to the Jurisdictional Statement. The following opinions are also reported:

First appeal to the Appellate Division: 22 A.D. 2d 826, 255 N.Y.S. 2d 146 (1964);

Second appeal to the Appellate Division: 25 A.D. 2d 564, 267 N.Y.S. 2d 756 (1966);

Appeal to the Court of Appeals: 18 N.Y. 2d 635, 272 N.Y.S. 2d 780, 219 N.E. 2d 294 (1966).

Questions Presented

Was the dismissal of Appellant's complaints affirmed by the New York Court of Appeals on the non-federal ground of Appellant's "totality of conduct" over an extended period, which constituted wilful disobedience of an order directing him to submit to a pre-trial examination?

May the Appellant prosecute this appeal even though a receiver has been appointed for him pursuant to an order specifically transferring the causes of action herein to the receiver?

Statement of the Case

In 1950 the Incorporated Village of Laurel Hollow brought an action in the Supreme Court of the State of New York, Nassau County, to enjoin Appellant and his co-plaintiffs in these actions from using their premises (not the former Tiffany Estate Mansion but a building on the Estate) in the Village for the purposes of manufacturing and processing wallpaper and related products in violation of the Building Zone Ordinance of the Village. After a full trial on the merits, a judgment was entered permanently

enjoining Appellant and others from conducting such business and commercial activities, and that judgment was affirmed and made more stringent by the Appellate Division and the Court of Appeals of New York, in that it specifically directed the removal of all of the manufacturing facilities, e. g. screens, vats, etc., from the premises.[1]

In wilful disregard of the foregoing injunction and specific direction, Appellant and his co-plaintiffs did not remove such facilities and continued to use the premises for the prohibited purposes from 1954, when the permanent injunction became final, until early in 1963, when the illegal operations were finally terminated as a result of various actions by the Village detailed below. Contrary to the erroneous averments in the Jurisdictional Statement (pp. 6, 14), between 1954 and 1962 the Village took no further action whatsoever, assuming in good faith, albeit mistakenly, that Appellant and his co-plaintiffs were obeying the mandates of the New York courts. There were no prosecutions in 1954 or in any other year during such period. It was not until July, 1962 that the Building Inspector of the Village quite by accident, while conducting a routine inspection of buildings in the Village pursuant to statutory authority, found that Appellant and others were still using the same facilities for manufacturing and processing wallpaper on the property.

Following further inspections of the property in October and December, 1962 and January, 1963, the Village applied for and obtained two orders adjudging Appellant and his co-plaintiffs to be in contempt of court for having disobeyed the permanent injunction and fining them for such contempt. The orders of contempt were subsequently reversed on the ground that they were obtained as a result of unlawful searches.[2]

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[1] *Incorporated Village of Laurel Hollow* v. *Laverne Originals, Inc.*, 283 App. Div. 795, 128 N.Y.S. 2d 326 (2d Dept. 1954), *aff'd.* 307 N.Y. 784, 121 N.E. 2d 618.

[2] *Ibid.*, 17 N.Y. 2d 900, 271 N.Y.S. 2d 996, 218 N.E. 2d 900 (1966).

Because of their apparent intention to continue the illegal operations even after they had been held in contempt, the Village in 1963 also proceeded against Appellant, his co-plaintiffs and their employees pursuant to the provisions of its Building Zone Ordinance in criminal proceedings in the Police Justice Court of the Village. Although the Village obtained convictions of Appellant and the other defendants in the criminal proceedings for violations of the Building Zone Ordinance, the convictions of Appellant were set aside by the Court of Appeals of New York on the above described ground, namely that the evidence, on which they were based, was obtained through investigations of the subject property without benefit of a search warrant and was inadmissible.[3]

Immediately after the aforesaid convictions in February, 1963, the first of these companion actions by Appellant and his co-plaintiffs to recover the sum of $2,150,000 was commenced in Supreme Court, Nassau County, against the Village and various of its elected and appointed officers and officials. The causes of action herein are for alleged theft of "trade", artistic and professional secrets, alleged trespass and alleged *prima facie* tort.

Thereafter in March, 1963, the Village instituted an action for civil penalties for violations of its Building Zone Ordinance against Appellant, his co-plaintiffs in these actions and their employees. An award of partial summary judgment in favor of the Village was reversed on the same ground that Appellant's convictions and the contempt orders were reversed. Nevertheless the action (and indeed all three causes of action alleged in the complaint therein) is still pending in Supreme Court, Nassau County, although a three-year statute of limitations prevents recovery by the Village for violations occurring prior to March, 1960.[4]

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[3] *People* v. *Laverne*, 14 N.Y. 2d 304, 251 N.Y.S. 2d 452, 200 N.E. 2d 441 (1964).

[4] *Incorporated Village of Laurel Hollow* v. *Laverne, Inc.*, 24 A.D. 2d 615, 262 N.Y.S. 2d 622 (2d Dept. 1965).

The second of the instant actions was instituted in August, 1963, and the two have been treated as one action for all purposes ever since.

After completion of pre-trial depositions of certain of the Appellees, a notice to take the deposition of Appellant was served on April 15, 1964 on behalf of the individual Appellees. Appellant moved to vacate said notice on the ground that any testimony he might give might tend to incriminate him. This motion was denied pursuant to an order, entered on May 7, 1964, directing Appellant to appear for examination on May 29, 1964. (A-1, Appendix to Jurisdictional Statement). On that day Appellant appeared but refused to answer any questions, except to state his name, on the ground of the privilege of self-incrimination. (Transcript, EBT, May 29, 1964).

On June 26, 1964, the Appellees moved in both actions to strike the complaints of Appellant and his co-plaintiffs on the ground that the plaintiffs could not on the one hand maintain these actions to recover the sum of $2,150,000 and on the other hand hide behind the privilege against self-incrimination as to all questions asked (except his name) when defendants sought in good faith to conduct examination before trial. In his decision of July 16, 1964 (A-1-6, Appendix to Jurisdictional Statement), Justice Suozzi denied the motion as to plaintiffs Estelle Laverne and Laverne, Inc. and denied the motion as to Appellant on condition that he appear for further examination, answer the non-incriminating questions that had been asked on May 29, 1964, submit any questions that might tend to incriminate him to the appropriate Justice then sitting and otherwise conduct himself in accordance with the terms of the decision. All three plaintiffs appealed from the order entered on that decision, and on November 30, 1964 the Appellate Division, Second Department, unanimously affirmed as to Appellant and dismissed the appeals by Estelle Laverne and Laverne, Inc.[5]

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[5] *Laverne* v. *Incorporated Village of Laurel Hollow*, 22 A.D. 2d 826, 255 N.Y.S. 2d 146 (2d Dept. 1964).

The order of the Appellate Division directed Appellant to appear for further examination either at a time to be agreed upon by counsel or pursuant to a ten-day notice to be served upon Appellant's attorneys. Failing to obtain a stipulation, Appellees served a notice on December 4, 1964 to continue the deposition of Appellant on December 16, 1964 and at the same time served a notice to take the deposition of Laverne, Inc. by Erwine Laverne, its president, on the same day. A copy of the order of the Appellate Division directing the continued examination of Appellant was not served until December 11, 1964.

On December 15, 1964, Appellant and his counsel appeared at court, but objected to the continuation of Appellant's deposition solely on the ground that the notice thereof should have been served together with and not prior to service of a copy of the Appellate Division order. Justice Smith sustained this technical objection (Transcript of December 15, 1964 Hearing Before Justice Smith), and a new notice was served on December 16, 1964, rescheduling the continuation of Appellant's deposition for December 28, 1964. (Transcript of December 28, 1964 Hearing Before Justice Farley).

On December 15, 1964, counsel for Appellant also objected to the holding of the deposition of Laverne, Inc., first on the ground that such deposition was stayed by the Appellate Division and when and after it became apparent that Justice Smith would overrule the first objection, second on the ground that Laverne, Inc. was a bankrupt in proceedings in the United States District Court for the Eastern District of New York. Counsel at that time represented unequivocally that he had first learned of the bankruptcy proceedings on the morning of that day, December 15, 1964. (Transcript of December 15, 1964 Hearing Before Justice Smith). Within days Appellees proved that counsel for Appellant had in fact been aware and had concealed from Appellees the fact of the bankruptcy since as early as June 22, 1964, some six months before. (Transcript of December 28, 1964 Hearing Before Justice Farley).

It was subsequently held that Laverne, Inc. could not take advantage of the belated revelation of its bankruptcy to avoid examination before trial (A-7-9, Appendix to Jurisdictional Statement), and the dismissal of its complaints in these actions was affirmed by the Appellate Division, subject to the condition that the trustee in bankruptcy should be given an opportunity to intervene within a specified time if he so desired.[6] No such intervention has taken place, the time therefor has expired and Laverne, Inc. did not appeal to the Court of Appeals. Thus the dismissal of its complaints, is not an issue before this Court despite the somewhat misleading manner in which the notices of appeal to this Court and the Court of Appeals of New York and the Jurisdictional Statement have been worded. The foregoing facts with respect to Laverne, Inc. are recited solely for the purposes of clarifying the record as to the question of who is and who is not an Appellant, and to show the tactics employed by the corporate plaintiff, similar to those of Appellant, to evade examination before trial. (Compare similar and most recent concealment, *infra*, at p. 9).

On December 22, 1964, Appellees were served with papers in support of a motion for a protective order vacating or modifying the aforesaid notice served on December 16, 1964 to continue the deposition of Erwine Laverne on December 28, 1964. Appellees regarded that motion as a nullity on the ground that it was made in the improper forum. Although this contention was upheld by Justice Robinson, it was rejected by the Court of Appeals of New York.[7]

In any event, defendants were ready to continue the deposition of Appellant on December 28, 1964, but there was no appearance that day by either Appellant or his

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[6] *Ibid.*, 25 A.D. 2d 564, 267 N.Y.S. 2d 756 (2d Dept. 1966).

[7] *Ibid.*, 18 N.Y. 2d 635, 636, 272 N.Y.S. 2d 780, 781, 219 N.E. 2d 294 (1966).

counsel, and a transcript was made before Justice Farley in which Appellant's default was noted. (Transcript of December 28, 1964 Hearing Before Justice Farley).

Thereafter, upon motion of Appellees, in a decision rendered on February 3, 1965 Justice Robinson of the Supreme Court, Nassau County, dismissed the complaints of both Appellant and Laverne, Inc., holding that their attempts to evade the examinations were "wilful and deliberate" and "prejudicial to the defendants' rights." (A-6-10, Appendix to Jurisdictional Statement). Such dismissal was upheld by the Appellate Division except, as previously noted, that Court modified the order and judgment of the Supreme Court, Nassau County, to the extent of giving the trustee in bankruptcy of Laverne, Inc. an opportunity to intervene in the litigation, which as noted he did not do. The Appellate Division, after reviewing the same facts recited hereinabove, said:

> ". . . In our opinion there is ample evidence that plaintiff Erwine Laverne has wilfully failed to purge himself of his prior disobedience of an order directing him to submit to a pretrial examination . . ."[8]

Taking advantage of the modification by the Appellate Division with respect to Laverne, Inc., Appellant appealed to the Court of Appeals, which unanimously affirmed the dismissal of his complaints. The Court of Appeals specifically held:

> ". . . [T]he Court properly dismissed the complaint —in the sound exercise of its judicial discretion— because of plaintiff's willful failure to purge himself of his disobedience of prior court orders compelling disclosure on matters relevant to his causes of action and defenses thereto (CPLR 3126) . . ."[9]

and

> ". . . The Appellate Division affirmed this dismissal because *Laverne's totality of conduct* evidenced a

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[8] *Ibid.*, 25 A.D. 2d 564, 267 N.Y.S. 2d 756.

[9] *Ibid.*, 18 N.Y. 2d 635, 636, 272 N.Y.S. 2d 780, 781, 219 N.E. 2d 294, 295.

> wilful failure 'to purge himself of his prior disobedience', a factual determination supported by the evidence and beyond the scope of this Court's review . . . ." (Empasis added.) [9]

Having thus determined the appeal on the basis of Appellant's "totality of conduct", the Court of Appeals went on to discuss and resolve Appellant's constitutional argument in favor of Appellees, holding that in civil litigation the Fifth Amendment privilege against self-incrimination is not available when used by a plaintiff as an affirmative weapon to frustrate the judicial process.[10]

This appeal is from the order entered in the Court of Appeals of New York on July 7, 1966. Although the papers filed incorrectly convey the impression that there is more than one Appellant before this Court, in fact Erwine Laverne is the sole Appellant. Estelle Laverne was not affected by the order and judgment of the Supreme Court, Nassau County, and her actions have not been dismissed.[11] Laverne, Inc. was foreclosed from taking any further proceedings when its trustee in bankruptcy failed to intervene following the opportunity to do so provided by the Appellate Division.

During the preparation of this motion, it was brought to the attention of counsel for Appellees for the first time from outside sources and not by Appellant (who now again has deliberately attempted to conceal from the courts a material fact) that on December 30, 1965, pursuant to an order of the Supreme Court of the State of New York, New York County, a receiver was appointed for Appellant, and that such order specifically transferred title to the causes of action herein to the receiver (A-1, Appendix to Motion). The receiver has never been substituted for Appellant, and, therefore, this appeal, as was Appellant's appeal to the Court of Appeals of New York, is being

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[10] *Ibid.*

[11] New York CPLR, Section 5511.

prosecuted by a party who no longer has any interest in these actions. (Compare Laverne, Inc.'s concealment of the fact of its bankruptcy outlined above at p. 6). Although Appellant has filed a notice of appeal to this Court from the affirmance of the order appointing the receiver, it is difficult to conceive how such an appeal presents a substantial question for decision by this Court.

ARGUMENT

1. The Appeal Was Decided on Non-Federal Grounds.

Analysis of the opinions of the New York courts, and particularly the opinion of the Court of Appeals, can lead only to the conclusion that Appellant's complaints were dismissed on the non-federal ground of the wilful and deliberate course of conduct followed by Appellant to evade examination before trial, which started with the first motion for a protective order and culminated in the belated revelation to the courts and to Appellees of the bankruptcy of Laverne, Inc., a last ditch maneuver attempted by Appellant despite two directions by the Supreme Court, Nassau County, and one by the Appellate Division to submit to examination. It was Appellant's disobedience of such directions that led to the dismissal of his complaints and not, as urged by Appellant, because of his exercise of the privilege against self-incrimination.

Because the appellate courts of New York based their affirmance of the dismissals of Appellant's complaints on the basis of his "totality conduct", they were not required to reach the question of Appellant's use of the privilege. Nevertheless the orders and opinions of the Supreme Court, Nassau County, show a concern for and a protection of the privilege consistent with the requirements of the Fifth and Fourteenth Amendments. In deciding Appellant's original motion for a protective order, Justice Gulotta clearly

recognized Appellant's right to exercise the privilege although properly holding that possible self-incrimination was not a ground for vacating the notice of examination (A-1, Appendix to Jurisdictional Statement). When Appellees moved to dismiss these actions for the first time, Justice Suozzi denied the motion, saying:

> "To avoid further and unnecessary motion practice, the order to be submitted hereon, or any other orders or notices for other examinations of the plaintiffs in both actions, will provide that they shall be held at the Courthouse, so that rulings on the claim of privilege may be obtained as the examination progresses and the privilege is claimed. The plaintiff will have ample opportunity at the time an incriminating question is asked to claim the privilege, and upon statement in detail of his basis for the claim, obtain a ruling . . ." (A-4-5, Appendix to Jurisdictional Statement).

It was following the affirmance by the Appellate Division (22 A.D. 2d 826, 255 N.Y.S. 2d 146) of the order entered upon Justice Suozzi's decision that Appellant embarked on the second phase of his campaign to avoid examination at all costs, to-wit: a technical objection to service of the notice of examination, the last minute revelation of the bankruptcy of Laverne, Inc., and the second motion for a protective order despite three directions to appear for examination. None of these maneuvers had anything to do with the privilege against self-incrimination.

Little wonder, that, based on the foregoing facts, as well as Appellant's conduct at the abortive examination on May 29, 1964 and the tactics employed by Appellant and counsel to avoid examination of Laverne, Inc., the Appellate Division held that Appellant had wilfully failed to purge himself of his prior disobedience of an order directing him to submit to examination. (25 A.D. 2d 564, 267 N.Y.S. 2d 756). It is to be noted that the Appellate Division made no mention of and did not rest its decision on the question of the

exercise by Appellant of the privilege against self-incrimination. The Court of Appeals recognized that Appellant's "totality of conduct" was the basis of the affirmance by the Appellate Division and held that this factual determination was beyond its power to review. (18 N.Y. 2d 635, 636, 272 N.Y.S. 2d 780, 781, 219 N.E. 2d 294, 295).

When an appeal is from a judgment of a State court which clearly rests on a non-federal ground, this Court has consistently refused to decide a federal question even though raised by the Appellant in the lower court, *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298, 765 Ct. 824, 827, 100 L. Ed 1188 (1956); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S. Ct. 459, 462-463, 89 L. Ed 789 (1945), and a plain reading of the Court of Appeals' decision leaves no doubt that that court considered Appellant's "totality of conduct" to be a matter separate and distinct from the constitutional argument raised by Appellant.

Appellees submit that the conclusion is inescapable that the Court of Appeals' decision in this case rests squarely on non-federal ground and, therefore, this appeal should be dismissed. If, however, this Court should not agree and should decide that the statement by Court of Appeals with respect to Appellant's exercise of the privilege against self-incrimination is necessary to the resolution of this case, then it is submitted that the federal question presented is not a substantial one, and that there is nothing contained in the decision of the Court of Appeals in this case or in *Levine* v. *Bornstein*, 13 Misc. 2d 161, 174 N.Y.S. 2d 574 (Sup. Ct. 1958), *aff'd.* 7 A.D. 2d 995, 183 N.Y.S. 2d 868 (2d Dept.), *aff'd. without opinion* 6 N.Y. 2d 892, 190 N.Y.S. 2d 702, 160, N.E. 2d 921 (1959), which is inconsistent with the prior decisions of this Court. Even Appellant concedes that *Levine* v. *Bornstein, supra*, may be supportable (note 17, p. 17, Jurisdictional Statement), and his attempts to distinguish this case are not convincing.

2. Appellant is Not the Proper Party to Prosecute this Appeal

An order of the Supreme Court, New York County, granted on December 30, 1965 and entered on January 6, 1966, appointed a receiver of the property of Appellant and directed the receiver to assume control of, among other things, "various claims and causes of action . . . claimed by Erwine Laverne . . ." (A-3, Appendix to Motion to Dismiss).

It would appear that the law of New York is controlling in this Court with respect to the rights of the receiver, *Cf. 28 U.S.C. § 959(b)*, and that New York requires that, in the event of the appointment of a receiver for a party to a pending action, the receiver must be substituted for the party. New York Civil Practice Law and Rules, Section 1017 provides:

> "*Substitution in case of receivership or dissolution of a corporation.* If a receiver is appointed for a party, or a corporate party is dissolved, the court *shall order* substitution of the proper parties." (Emphasis added.)

Section 1021 of the Civil Practice Law and Rules provides that when (as in this case) an event requiring substitution occurs and substitution is not made within four months of such event, the court in which an appeal by an improper party is pending may dismiss the appeal.

Conclusion

For the foregoing reasons, and particularly in view of the fact that the Court of Appeals of New York decided this case on non-federal grounds and the fact that the appeal has not been taken by the proper party, the appeal should be dismissed.

Respectfully submitted,

SPRAGUE, DWYER, ASPLAND & TOBIN,
Counsel for Individual Appellees.

THOMAS C. PLATT, JR.,
Counsel for Appellee,
Incorporated Village of Laurel Hollow.

Of Counsel:
STEPHEN VAN R. ULMAN

APPENDIX

Order of Supreme Court, New York County

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the City of New York, on the 30th day of December, 1965.

Present:

HON. FRANCIS T. MURPHY, JR., *Justice.*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

PIRANESI IMPORTS, INC.,

Plaintiff and Judgment Creditor,

against

FURNITURE TEXTILES & WALLCOVERINGS, INC., ERWINE LAVERNE, DECORATIVE TRENDS, INC., LOUIS LA VERNE & DINO LEVI,

Defendant and Judgment Debtors.

The above-named Piranesi Imports, Inc., plaintiff and judgment creditor herein having moved for an order appointing a Receiver herein of the property of the above-named defendant and judgment debtor, Erwine Laverne, and the matter having come on duly to be heard at a Special Term, Part I of the Supreme Court, on the 5th day of November, 1965.

Now, upon reading and filing the notice of motion granted by the Court dated the 22nd day of November,

1965, and the affirmation of Edward Nathan dated the 22nd day of October, 1965 and the affirmation in reply of Edward Nathan dated the 8th day of November, 1965, together with Exhibits "A" to "G" inclusive attached to said reply affirmation, with proof of due service thereof upon said judgment debtor within the time and in the manner in said motion provided, and after hearing Edward Nathan, Esq., in support of said motion, and Godfrey P. Schmidt, Esq., in opposition, thereto all in support of said motion, and the affidavit of Erwine Laverne, sworn to November 4th, 1965, in opposition thereto, and after due deliberation having been had thereon. Now, on motion of Edward Nathan, Esq., attorney for Piranesi Imports, Inc., the above-named judgment creditor, it is

ORDERED that Alfred K. Weiner, Esq., of 521 5th Avenue, N. Y., N. Y., be and he hereby is appointed Receiver of the following property:

a. All assets and property of Erwine Laverne both tangible and intangible contingent or otherwise including, but not limited to:

1. The sum of $89,000.00 received in settlement by Erwine Laverne from India Airlines given by Erwine Laverne to his son, and fraudulently hidden or transferred.

2. Insurance policies and monies borrowed against these policies.

3. Payments made for Erwine Laverne's benefit by various corporations.

4. Salary owing Erwine Laverne from Laverne International, Inc.

and it is further

Order of Supreme Court, New York County

ORDERED that the receiver before entering upon his duties and in order to qualify therefor shall execute and file an oath herein that he will faithfully and fairly discharge the trust committed to him, and it is further

ORDERED that the receiver before entering upon his duties, and in order to qualify therefor shall cause an undertaking to be executed and filed herein, in the sum of $1000.00, conditioned that he will faithfully discharge his duties, and it is further

ORDERED that the receiver take into possession, assume control of and administer or collect various claims and causes of action and other intangible items or property claimed by Erwine Laverne as shall be necessary for the purposes of satisfying this judgment or to do any other acts designed to satisfy the judgment and it is further

ORDERED that the said receiver be empowered to utilize all methods of discovery to locate the assets and claims of said defendant, and to bring such action as shall reduce them to his possession, and it is further

ORDERED that the receiver sell and convert into cash so much of the said property of the said defendant, Erwine Laverne, as shall be necessary for the purposes of satisfying this judgment, and it is further

ORDERED that the said receiver out of the money and the proceeds of the sale of the said property of the said defendant, Erwine Laverne, to pay to the said plaintiff the amount of their judgment, paying the sum of $35,066.86 plus interest on $29,000.04 from April 22nd, 1964, and it is further

ORDERED that the Receiver shall keep written accounts itemizing receipts and authorized expenditures, describing

the aforementioned property and naming the depository of receivership funds, which accounts shall be open to the inspection of any person having an apparent interest in the property, and it is further

ORDERED that the said Receiver and any party to this proceeding or any person interested in the property which may be taken into hands of such Receiver may apply at any time on due notice to this Court for further or other instructions and for such further power as may be necessary to enable the Receiver to carry out properly the terms of this order and fulfill his duties as such Receiver.

Enter,

F. T. M.,

/s/ FRANCIS T. MURPHY, JR.,
J. S. C.
on 12/30/65

Filed January 6th 1966
New York County Clerk's Office

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REPLY TO MOTION TO DISMISS:

1. The issue in this case is whether civil litigants can be compelled to choose between incriminating themselves on depositions or, in the alternative, be deprived of their day in court. In their Motion to Dismiss, Appellees have failed to discuss this issue except in the briefest conclusory terms, and have failed to discuss, or even to cite, a single federal authority in point 1

2. The decision below clearly did not rest upon an independent non-federal ground, since that decision explicitly and necessarily rejected Appellants' assertion that dismissal of their action was in violation of the privilege against self-incrimination 2

3. All three Appellants have standing to prosecute this appeal, and Appellees' contention to the contrary is patently frivolous 3

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS, STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

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cision. (Jurisdictional Statement, A-14) Accordingly, summary reversal of the decisions below would not be inappropriate. *Cf. United States v. Haley*, 358 U.S. 644 (1959); Stern & Gressman, *Supreme Court Practice* 196 (3d ed., 1962). However, in view of the broad importance of the constitutional issues presented (see Jurisdictional Statement, pp. 10-11), Appellants respectfully submit that plenary consideration would be preferable.

2. The decision below clearly did not rest upon an independent non-federal ground, since that decision explicitly and necessarily rejected Appellants' assertion that dismissal of their action was in violation of the privilege against self-incrimination.

Where a state court, "deeming the federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, this court has jurisdiction to review the judgment." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). A reading of the opinion of the Court of Appeals of New York makes it manifest that that court deemed the federal question to be before it, and that it actually entertained and decided that question adversely to the federal right asserted. (Jurisdictional Statement, A-14)

Moreover, it is the province of this Court to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support. *Ancient Egyptian Order v. Michaux*, 279 U.S. 737, 745 (1949). Such an inquiry cannot be avoided without renouncing a jurisdiction conferred upon this Court by law and designed to protect and maintain the supremacy of the Constitution. *Ward v. Love County*, 253 U.S. 17, 23 (1920).

It is therefore immaterial that the New York Court of Appeals referred to Appellant Laverne's "totality of conduct" as justifying dismissal of his complaint. The

plain and inescapable fact is that the substance of this "totality of conduct" was Appellant's justifiable insistence upon his constitutional privilege against self-incrimination in refusing to answer questions on depositions. This is, of course, precisely the reason that the New York Court of Appeals did in fact resolve the Constitutional issue (Jurisdictional Statement, A-14). That court expressly held:

> As to plaintiff's constitutional argument that by compelling disclosure the court is denying him the privilege against self-incrimination, the issue was thoroughly discussed and resolved in *Levine v. Bornstein* (13 Misc. 2d 161 [S. Ct., 1958], aff'd 7 Ad 2d 995 [2d Dept.], aff'd without opinion, 6 N.Y. 2d 892 [1959]). (Jurisdictional Statement, A-14)

This important constitutional issue was "thoroughly discussed and resolved," however, without any reference to *Malloy v. Hogan, supra, Societe Internationale v. Rogers, supra,* or any other relevant federal authority. Thus, Appellees' assertion of an independent non-federal ground is tenable only on the hypothesis that a federal constitutional issue is rendered "non-federal" by the simple expedient of refusing to recognize federal authority in deciding the issue.

3. All three Appellants have standing to prosecute this appeal, and Appellees' contention to the contrary is patently frivolous.

Appellants in this case are seeking damages arising out of an unlawful search of their premises and an unlawful seizure of their property conducted by Appellees as public officials and individually. Appellants' interest in this litigation is substantial, and each of them has been adversely affected by the decisions of the courts below.

In addition, each of them has been, and remains, a named party of record both in the courts below and in this Court. The Notice of Appeal to the Court of Appeals of New York was filed on behalf of "Appellants" by "their"

attorneys. On the Notice form, the letter "s" was typed in (after "Appellant") and the word "their" was typed in, thereby clearly indicating that all of the named Appellants were noting an appeal. In addition, the certification of counsel in the Court of Appeals, pursuant to CPLR § 2105, was made by "counsel on the appeal for the Plaintiffs-Appellants." Further, the opinion in the Court of Appeals bears the caption, "Erwine Laverne, *et al*, Appellants." Thus, all Appellants have consistently appeared and been recognized as parties of record in the courts below.

Appellees' contention that Appellant Erwine Laverne has somehow been displaced as a party under New York law, is wholly without support in the record or in facts extraneous to the record. Under New York CPLR 5228(a), a receiver has no power and no duties and receives no property except as specified in the order of appointment.[1] Under the order referred to by Appellees, the receiver is not vested with Appellant Laverne's causes of action, but is merely empowered to "take into possession assume control of and administer or collect various claims and causes of action . . . as shall be necessary for the purposes of satisfying this judgment. . . ." (Motion to Dismiss, A-3) The receiver has not taken into possession the present cause of action, nor has he been substituted as a party in the New York courts. Moreover, his limited interest of satisfying the judgment in that case would not divest Appellant Laverne of his paramount interest in the present claim, even were the receiver to elect to "assume control" of it.

Appellant Estelle Laverne is directly affected by the decisions below. Although her complaint has not yet been dismissed, she has explicitly been warned that she will be presented with the same "choice between the

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[1] "The order of appointment shall specify the property to be received, the duties of the receiver and the manner in which they are to be performed. . . ." CPLR 5228(a).

rock and the whirlpool." As stated by the Nassau County Supreme Court:

> "...the views expressed and the holdings herein will be equally applicable and pertinent on any examination before trial which may hereafter be had of the plaintiff Estelle Laverne in these actions. The assertion of a claim of privilege [against self-incrimination] in a manner inconsistent with this opinion will be deemed a willful refusal sufficient to warrant a dismissal of the plaintiff's complaint."

It is therefore erroneous for Appellees to say that Estelle Laverne was "not affected" by the order and judgment of the Supreme Court of Nassau County. (Motion to Dismiss, p. 9)[2]

Appellees further contend that Appellant Laverne, Inc. has no standing to appeal because "the dismissal of its complaints in these actions was affirmed by the Appellate Division, subject to the condition that the trustee in bankruptcy should be given an opportunity to intervene," and because "no such intervention has taken place."

This argument can only be characterized as disingenuous, since Appellees have themselves correctly and successfully[3] argued in the Appellate Division in the course of this very litigation that the trustee in bankruptcy need not prosecute a suit commenced by the bankrupt prior to adjudication, and that the bankrupt may carry on a suit in its own behalf. In support of this argument, Appellees quoted from 1 *Collier on Bankruptcy*, p. 1186:

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[2] The Appellate Division dismissed the appeal of Estelle Laverne on the grounds that her complaint had not been dismissed. *Laverne v. Incorporated Village of Laurel Hollow*, 22 A.D.2d 826, 255 N.Y.S.2d 146 (2d Dept. 1964). However, that court did not modify in any way the ruling of the Supreme Court of Nassau County quoted in the text above. Accordingly, if Appellant Estelle Laverne had not joined in this appeal in the New York Court of Appeals and in this court, she would have risked being bound by that ruling as the law of the case.

[3] See Jurisdictional Statement, A-8.

> ". . . Even though title to the chose in action vests in the trustee under § 70, if the trustee, upon appointment and qualification, declines or fails to prosecute the action, the bankrupt may continue its prosecution to judgment . . . ."

Appellees also quoted from *Paradise v. Vogtlandisch Maschinen-Fabrik*, 99 F.2d 53, 55 (3d Cir. 1938): "If the trustees decline or fail to prosecute the action the bankrupt may continue its prosecution to judgment."

It is clear, therefore, that Laverne, Inc. has standing to pursue this appeal despite its bankruptcy and despite the failure of the trustee to intervene. Moreover, it is also apparent on the face of the opinions in the courts below that dismissal of the complaint of Laverne, Inc. was based in substantial part upon the reliance of its President, Appellant Erwine Laverne, upon his privilege against self-incrimination in refusing to answer questions on depositions.

CONCLUSION

Accordingly, Appellants respectfully request that the decision below be summarily reversed or, in the alternative, that the substantial and important constitutional issues presented by this appeal be given plenary consideration.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LAVERNE ET AL. *v.* INCORPORATED VILLAGE OF LAUREL HOLLOW ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 984. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment sought to be reviewed rests upon an adequate state ground.